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No. 91-1241

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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JOHN E. SHIMOTA AND NAN B. SHIMOTA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the lump-sum payment petitioner received from the Civil Service Retirement and Disability Fund pursuant to his election of an "alternative form[] of annuity" under 5 U.S.C. 8343a was taxable under Section 72(e) of the Internal Revenue Code.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-2a) is reported at 943 F.2d 1312. The opinion of the Claims Court (Pet. App. 3a-36a) is reported at 21 Cl. Ct. 510.

### JURISDICTION

The judgment of the court of appeals was entered on September 12, 1991. A petition for rehearing was denied on November 6, 1991 (Pet. App. 38a). A suggestion for rehearing en banc was declined on November 20, 1991 (Pet. App. 39a). The petition for a writ of certiorari was filed on January 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner John E. Shimota [1] was a federal employee who participated in the Civil Service Retirement System (CSRS) and made contributions to the Civil Service Retirement and Disability Fund (the Fund). Petitioner retired in November 1986. His total contributions to the Fund were $53,382.77. Pet. App. 4a-5a.

On April 1, 1987, petitioner began receiving payments under the basic CSRS annuity provided in 5 U.S.C. 8336, 8339. On June 6, 1987, however, he made an election to receive the "alternative form[] of annuity" provided in 5 U.S.C. 8343a. Section 8343a allows a retiree to elect to receive a lump-sum payment of an amount equal to his contributions to the Fund, together with a reduced annuity. On August 3, 1987, petitioner received his lump-sum payment in the amount of $53,382.77, less withheld income taxes. His monthly CSRS annuity was reduced by $199 in order to reflect the lump-sum payment. Pet. App. 7a.

The IRS advised petitioner that 5.9% of the lump-sum payment was excludible from his gross income. Petitioner filed his 1987 income tax return in accordance with the IRS's advice, reporting as income all but 5.9% of the lump-sum payment. In June 1988, however, petitioner filed a claim for refund of the amount of tax paid with respect to the lump-sum payment, based on the position that no part of the payment was includible in his gross income. The IRS denied the refund claim and petitioner brought this refund action in the Claims Court. Pet. App. 7a-8a.

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[1] Petitioner Nan B. Shimota is a party solely by virtue of having filed a joint income tax return with her husband for the year in issue.

2. The Claims Court rejected petitioner's argument (Pet. App. 3a-36a). The court agreed with the government that Sections 402 and 72 of the Internal Revenue Code (Code or I.R.C.) (26 U.S.C.) governed the tax treatment of the lump-sum payment (Pet. App. 17a-22a). Section 402(a)(1) provides that the amount distributed to a distributee by an employees' trust described in Section 401(a) "shall be taxable to him, in the year in which so distributed, under section 72 (relating to annuities)." The court concluded that the Fund is an employees' trust described in Section 401(a) and that, accordingly, the lump-sum payment was taxable under Section 72 (Pet. App. 19a-21a). The court further observed that "[e]ven if the Fund is not an employees' trust described in § 401(a) and therefore § 402(a) does not apply, § 402(b) would require that the lump sum distribution be taxed under § 72" (*id.* at 22a).

Turning to Section 72, the Claims Court observed that Section 72(e) sets forth rules governing the taxation of any amount received under an annuity contract that is "not received as an annuity" (Pet. App. 23a-24a). The court concluded that "[t]he lump-sum payment at issue is an 'amount not received as an annuity' because it is received in the form of a one-time payment" (*id.* at 24a). Section 72(e)(2)(A) generally provides that such an amount that is "received on or after the annuity starting date, shall be included in gross income." The court concluded that the lump-sum payment received by petitioner fell within this provision and, accordingly, that it was includible in his gross income (Pet. App. 23a-25a). The court also re-jected petitioner's argument that his lump-sum payment could not be taxed under Section 72 because it represented a "return of capital," observing that Section 402(a)(1) "does not distinguish between

distributions that are income and distributions which are allegedly a return of capital; it simply directs that distributions shall be taxed under § 72" (Pet. App. 19a).[2]

The court of appeals affirmed (Pet. App. 1a-2a). The court concluded that petitioner's arguments "were fully considered and the issues correctly decided in [the Claims Court's] thorough and well-reasoned opinion" (*id.* at 2a). Accordingly, the court of appeals "adopt[ed] that opinion and affirm[ed] the Claims Court's judgment" (*ibid.*). The court of appeals also observed (*ibid.*) that the Tax Court, in *Guilzon* v. *Commissioner*, 97 T.C. 237 (1991), had agreed with the Claims Court that a lump-sum payment received under 5 U.S.C. 8343a was taxable under Section 72(e) of the Internal Revenue Code.

## ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The issue in this case concerns the income tax treatment of a lump-sum payment received by petitioner from the Civil Service Retirement and Disability Fund (the Fund) pursuant to his election of an "alternative form[] of annuity" under 5 U.S.C. 8343a.[3] The Fund consists of contributions made by

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[2] The Claims Court also held that the lump-sum payment was subject to the ten-percent additional tax imposed by Section 72(t) of the Internal Revenue Code (Pet. App. 33a-35a). Petitioner does not challenge that holding in his petition.

[3] Contrary to the impression petitioner seeks to create, this case does not involve the question whether an employee is entitled to recover his contributions to the Fund tax-free, nor is there any issue of double taxation. As the Claims Court pointed out (Pet. App. 8a), an employee's contribution to the Fund will

federal employees and the government, together with earnings on these amounts. See 5 U.S.C. 8348. Congress has designated the Fund as a trust fund. 31 U.S.C. 1321(88). Employing agencies are required to deduct and withhold a specified amount of each employee's salary and also to contribute to the Fund an equal amount from the appropriation or fund used to pay the employee's salary. 5 U.S.C. 8334(a)(1). Amounts withheld from the employee's salary are taxable in the year in which the withholding is made. See *Hogan* v. *United States*, 513 F.2d 170, 175 (6th Cir.), cert. denied, 423 U.S. 836 (1975). Amounts contributed by the employing agency are not taxed to the employee until distribution. See I.R.C. § 402(a)(l); Treas. Reg. § 1.402(a)-1(a)(1)(i).

When an employee meets the eligibility requirements set forth in 5 U.S.C. 8336, he is entitled to retire and receive an immediate annuity computed under 5 U.S.C. 8339. An individual who leaves federal employment prior to meeting those requirements can elect to receive a "lump-sum credit" under 5 U.S.C. 8342(a). The "lump-sum credit" is an amount consisting of the amounts previously withheld from the employee's pay, amounts (if any) deposited by the employee covering earlier service, and (in some

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be recovered tax-free under the government's position as well as under petitioner's position. The difference between the positions of the parties is simply one of timing. Under petitioner's approach, he would be entitled to recover his contributions to the Fund tax-free up front, with all payments in excess of the amount of his contributions fully taxable. Under Section 72, however, which we maintain governs the tax treatment of petitioner's lump-sum payment, petitioner will recover his contributions to the Fund tax-free over the term of his annuity, with a portion of each annuity payment being excludible from tax and the remaining portion subject to tax.

circumstances) interest on those amounts. 5 U.S.C. 8331(8). The employee's receipt of the lump-sum credit "voids all annuity rights" under CSRS. 5 U.S.C. 8342(a).

In 1986, Congress enacted 5 U.S.C. 8343a, which gave employees who retired after June 5, 1986, and met the requirements of 5 U.S.C. 8336, an election to receive "alternative forms of annuities" instead of the basic annuity computed under Section 8339. The "alternative form[] of annuity" elected by petitioner has two components: payment of the lump-sum credit (as defined in 5 U.S.C. 8331(8)); and payment of an annuity. 5 U.S.C. 8343a(b). The lump-sum payment that is part of this alternative annuity under Section 8343a differs from the lump-sum credit described in Section 8342 in that receipt of the former, unlike the latter, does not void an employee's right to receive an annuity. [4] Congress provided in Section 8343a(c) that the alternative annuity "shall, to the extent practicable, be designed such that the present value of the benefits provided under such alternative (including any lump-sum credit) is actuarially equivalent to the present value of the annuity which would otherwise be provided the employee," as computed under Section 8339. The annuity payments provided under the "alternative form[] of annuity" are computed in accordance with Office of Personnel Management (OPM) regulations. OPM first computes the monthly rate of annuity that would otherwise be payable to the

[4] The amount of the "lump-sum credit" is the same under both Sections 8342 and 8343a. There are, however, material differences between the distributions under the two Sections. To avoid confusion, we will refer to the payment under Section 8342 as the "lump-sum credit" and the payment under Section 8343a as the "lump-sum payment."

retiree; "[t]hat monthly rate is then reduced by an amount equal to the retiree's lump-sum credit divided by the present value factor for the retiree's attained age (in full years) at the time of retirement"; and the reduced monthly rate "becomes the rate of annuity payable." 5 C.F.R. 831.2205(a). The regulation, in effect, reduces the annuity payments that otherwise would have been paid to the retiree by amounts whose present value is equal to the lump-sum payment.

Section 402 of the Internal Revenue Code sets forth the rules governing the taxability of beneficiaries of employees' trusts. Section 402(a)(1) provides that amounts distributed by a "qualified" employees' trust described in Section 401(a) of the Code are taxable to the distributee "under section 72 (relating to annuities)." See H.R. Rep. No. 2333, 77th Cong., 2d Sess. 104 (1942). The Claims Court concluded that the Fund is a qualified employees' trust described in Section 401(a) (Pet. App. 19a-21a).[5] Although petitioner argued in the Claims Court and the court of appeals that the Fund was not "qualified" under Section 401(a) (see Pet. App. 11a, 21a), he does not make that argument in his petition. Accordingly, any amount distributed by the Fund, including the payment in issue here, is taxable under Section 72 of the Code.

Section 72 provides specific rules for determining the tax treatment of amounts received under "an annuity, endowment, or life insurance contract."

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[5] See Rev. Rul. 74-138, 1974-1 C.B. 29, 30 (the Fund is a qualified trust under Section 401(a)); Rev. Rul. 70-150, 1970-1 C.B. 106 (same); Rev. Rul. 68-486, 1968-2 C.B. 184, 185 (same); Rev. Rul. 58-472, 1958-2 C.B. 30, 32 (same); I.T. 4102, 1952-2 C.B. 173, 174 (same); see also Treas. Reg. § 1.72-2(a)(3)(iii) ("Section 72 shall be applied to distributions received under the Civil Service Retirement Act.").

These rules generally provide that amounts received under such a contract (and, by virtue of Section 402(a)(1), amounts distributed by a qualified employees' trust) are includible in the gross income of the recipient, except to the extent that they are considered to represent a return of premiums or other consideration paid. Treas. Reg. § 1.72-1(a). A payment that is "received as an annuity" is taxed under Section 72(a) and (b), which generally provides that each annuity payment will be treated as both the receipt of income and the return of an aliquot portion of the premiums or other consideration paid for the annuity contract. Thus, pursuant to Section 72(a) and (b), "[t]he entire annuity payment is included in gross income and then the proportion of each annuity payment which the annuitant's investment in the annuity contract bears to his total expected return therefrom is excluded from income." *Garvey, Inc.* v. *United States*, 1 Cl. Ct. 108, 120 (1983), aff'd, 726 F.2d 1569 (Fed. Cir.), cert. denied, 469 U.S. 823 (1984).

Section 72 also contemplates the receipt of amounts that are "received under an annuity * * * contract" but are "not received as an annuity" (I.R.C. § 72(e)(l)(A)), and Section 72(e) provides rules governing the taxation of such amounts. The regulations explain the difference between an amount "received as an annuity" and an amount "not received as an annuity." Treasury Regulations § 1.72-1(b) states that " 'amounts received as an annuity' are amounts which are payable at regular intervals over a period of more than one full year from the date on which they are deemed to begin, provided the total of the amounts so payable or the period for which they are to be paid can be determined as of that date." The regulation further provides that "[a]ny other amounts to which the provisions of section 72 apply are considered to be

'amounts not received as an annuity.' " See also Treas. Reg. §§ 1.72-2(b)(2), 1.72-11(a)(l). The rules of Section 72(e) thus apply to any non-annuity payment that is received under an annuity contract, such as dividends, payments in the nature of dividends, and payments that represent a return of premiums paid or other consideration. See *Price* v. *United States*, 459 F. Supp. 362, 364-365 (D. Md. 1978) (return of excess contributions to state retirement fund taxable under Section 72(e)). Since Section 72 applies to any amount distributed by an employees' trust, Section 72(e) applies to any distribution by an employees' trust that is not an annuity payment.

As the Claims Court observed (Pet. App. 24a), since the lump-sum payment was a one-time payment, it did not constitute "amounts which are payable at regular intervals over a period of more than one full year" (Treas. Reg. § 1.72-1(b)). Since Section 72 applies to the payment (by reason of Section 402(a)(1)), Section 72(e) applies to determine the tax treatment of the payment, as the Claims Court correctly held (Pet. App. 24a-28a).

Section 72(e)(2)(A) provides that an amount to which Section 72(e) applies that is "received on or after the annuity starting date, shall be included in gross income." The "annuity starting date" is "the first day of the first period for which an amount is received as an annuity under the contract." I.R.C. § 72(c)(4). Petitioner received his first annuity payment from the Fund on April 1, 1987, and received his lump-sum payment on August 3, 1987 (Pet. App. 7a). Since the lump-sum payment was received after the annuity starting date, it is included in gross income pursuant to Section 72(e)(2)(A), as the Claims Court (Pet. App.

23a-24a) and the court of appeals (*id.* at 2a) correctly held. Accord, *Guilzon* v. *Commissioner*, 97 T.C. 237 (1991).

2. In an effort to avoid the clear rule of Section 72(e)(2)(A), petitioner argues that application of Sections 72(d) and 414(k) of the Code indicate that his lump-sum payment and his annuity payments were received under "separate contracts" (Pet. 9-17). Petitioner did not raise this argument in the Claims Court and did not raise it in his opening brief in the court of appeals. Indeed, he cited neither Section 72(d) nor Section 414(k) in that brief. He raised the argument for the first time in his appellate reply brief. Arguments not presented in the trial court generally should not be considered for the first time on appeal. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). Moreover, arguments can not be raised for the first time in a reply brief. *Miller* v. *Fairchild Indus. Inc.*, 797 F.2d 727, 738 (9th Cir. 1986); see *Kaufman Co.* v. *Lantech, Inc.*, 807 F.2d 970, 973 n.* (Fed. Cir. 1986). The court of appeals did not address the argument, and this Court should therefore decline to consider it. In any event, petitioner's argument lacks merit.

Section 1122(c)(3)(A) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2468, added Section 72(e)(9) to the Code, which provided: "Any employee contributions (and any income allocable thereto) under a defined contribution plan shall be treated as a separate contract for purposes of [Section 72(e)]." 26 U.S.C. 72(e)(9) (Supp. IV 1986). Congress contemplated that, under this provision, "if an employee withdraws employee contributions from such a plan or account, then for tax purposes, the distribution will be considered to be part nontaxable, i.e., a return of employee contributions, and part taxable, i.e., a distribution of earnings on those contributions."

2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-462 (1986). In 1988, Congress made a technical correction to the 1986 Act by repealing Section 72(e)(9) and adding Section 72(d), which provides: "For purposes of [Section 72], employee contributions (and any income allocable thereto) under a defined contribution plan may be treated as a separate contract." Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1011A(b)(2), 102 Stat. 3472. See S. Rep. No. 445, 100th Cong., 2d Sess. 172-173 (1988).

The "separate contract" treatment of new Section 72(d) applies only to employee contributions "under a defined contribution plan." A "defined contribution plan" is "a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." I.R.C. § 414(i). A "defined benefit plan" is "any plan which is not a defined contribution plan." I.R.C. § 414(j). Since the CSRS retirement program provides for benefits based on average pay and years of service (see 5 U.S.C. 8339), it is not a defined contribution plan, but, rather, is a defined benefit plan. Section 414(k) of the Code provides in part that, for purposes of Section 72(d), a defined benefit plan that has a component similar to a defined contribution plan will be treated as consisting of two plans:

> A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall * * * for purposes of section[] 72(d) * * * be treated as consisting of a defined contribution plan to the extent benefits

> are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

Petitioner's assertion that Section 414(k) makes the rule of Section 72(d) applicable to distributions from the Fund (Pet. 10-13) is wrong for two reasons.

First, the Fund, contrary to petitioner's implication (Pet. 13), does not contain a "separate account" for each individual federal employee. Federal agencies merely are required to maintain "individual retirement records" reflecting the amount that each employee has contributed to the Fund. 5 U.S.C. 8334(f). Moreover, the "separate account of a participant" referred to in Section 414(k) is "a separate account to which actual earnings and losses are allocated." Notice 87-13, 1987-1 C.B. 432, 438 (Q & A 14).[6] Amounts distributed to employees by the Fund are in no way based upon any earnings and losses of the Fund, much less upon earnings and losses of any "separate account" of the employee. Accordingly, the lump-sum payment under 5 U.S.C. 8343a is not "a benefit * * * which is based partly on the balance of the separate account of a participant" within the meaning of Section 414(k).

Second, even if the lump-sum payment were viewed as a benefit based partly on the balance of the separate account of a participant, it would not be "a benefit derived from *employer* contributions" (I.R.C. § 414(k) (emphasis added)). If the lump-sum payment rep-

[6] For purposes of Section 414(k), the plan provisions regarding a participant's separate account must satisfy the requirements of a defined contribution plan under Section 414(i). Rev. Rul. 79-259, 1979-2 C.B. 197, 198. A separate account to which earnings and losses are allocated is the essence of a defined contribution plan.

resents the balance of a separate account of a participant, then, since the lump-sum payment is an amount equal to the employee's contributions to the Fund, the lump-sum payment would be a benefit derived from *employee* contributions. In short, Section 414(k) does not apply here, and the separate contract treatment of Section 72(d) is therefore inapplicable.

3. Petitioner observes that the IRS has ruled that receipt of the lump-sum credit under 5 U.S.C. 8342 is taxable only to the extent that the amount received exceeds the employee's contributions (Rev. Rul. 70-150, 1970-1 C.B. 106) and suggests that a lump-sum payment received under 5 U.S.C. 8343a should be treated in the same manner (Pet. 6-9). The Claims Court correctly recognized that there is a difference between the lump-sum credit under 5 U.S.C. 8342 and the lump-sum payment under 5 U.S.C. 8343a that results in different tax treatment under Section 72 of the Internal Revenue Code (Pet. App. 26a-27a).

Section 72(e)(5) provides that certain types of payments "not received as an annuity" are not subject to the rules of Section 72(e)(2); instead, "the amount shall be included in gross income, but only to the extent it exceeds the investment in the contract." One of those specified payments is "any amount received, whether in a single sum or otherwise, under a contract in full discharge of the obligation under the contract which is in the nature of a refund of the consideration paid for the contract." 26 U.S.C. 72(e)(5)(E)(i); see also Treas. Reg. § 1.72-11(c). The receipt of the lump-sum credit under Section 8342 terminates the right of the employee to receive a CSRS annuity. The lump-sum credit is thus received "in full discharge" of the employee's annuity rights. Under these circumstances, as the Claims Court

observed (Pet. App. 27a), "§ 72(e)(5) applies and the employee only includes in gross income the difference between the amount received and the amount invested (which in the case of the lump-sum credit might be interest on the employee's contribution)." See 5 U.S.C. 8331(8)(C) (circumstances in which lump-sum credit includes interest); 5 C.F.R. 831.105(b) (same).

The receipt of a lump-sum payment under Section 8343a, however, does not result in a full discharge of the employee's annuity rights, because the retiree is still entitled to receive a reduced annuity. Therefore, the Claims Court correctly concluded that Section 72(e)(5) does not apply here and that "the taxability of this lump-sum payment is governed by § 72(e)(2)" (Pet. App. 27a).

4. Petitioner contends that the legislative history of 5 U.S.C. 8343a shows that Congress intended that the Section 8343a lump-sum payment would be a tax-free distribution (Pet. 13-17). Petitioner points to nothing in the legislative history of the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (the FERS Act), to support his contention. Section 8343a was enacted by Section 204(a) of the FERS Act, 100 Stat. 591-592. That provision was contained in neither the House nor the Senate version of the bill that became the FERS Act, but rather was added in conference. The Conference Report makes only passing references to the provision and offers no explanation of its purpose. H.R. Conf. Rep. No. 606, 99th Cong., 2d Sess. 149, 154 (1986).

Petitioner relies instead on the legislative history of other legislation enacted four years after the FERS Act, the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. Section 7001(a) of that Act, 104 Stat. 1388-327 to 1388-328,

amended Section 8343a to suspend the alternative form of annuity election for employees retiring after November 30, 1990, and before October 1, 1995. See H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 975-976 (1990). One section of the House Budget Committee report on the Act presents the House Post Office and Civil Service Committee's views on the portions of the bill within its jurisdiction. H.R. Rep. No. 881, 101st Cong., 2d Sess. 169-195 (1990). It is this report on which petitioner relies (Pet. 15-16).

Since application of the Internal Revenue Code provisions governing the taxation of distributions from employees' trusts plainly indicates that a Section 8343a lump-sum payment is taxable under Section 72(e) of the Code, there is no need to turn to legislative history to determine whether Congress intended that such payments would be taxed. Courts are required to "assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982), quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962). The Conference Report on the FERS Act says nothing about the tax treatment of a lump-sum payment. According to petitioner, the 1990 House Report indicates that a lump-sum payment is tax-free. But a statement in a committee report "as to what the Committee believes an earlier statute meant" provides "an extremely hazardous basis for inferring the meaning of a congressional enactment." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); see *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). Moreover, even apart from its status as post-enactment history, the report cited by petitioner hardly evidences a clearly expressed legislative intent that lump-sum payments are tax-free. The discussion of Section 8343a in the report

(H.R. Rep. No. 881, *supra*, at 170) is, at most, ambiguous with respect to whether the committee that prepared that report believed that a Section 8343a lump-sum payment would be tax-free. It is well settled that "exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988). There is no statutory provision granting an exemption for petitioner's lump-sum payment, and the absence of such a provision hardly can be overcome by reliance on ambiguous language in a committee report written four years after the enactment of Section 8343a.

Petitioner also contends that the legislative history of the Tax Reform Act of 1986 indicates that Congress contemplated that the "separate contract" treatment of Section 72(d) would apply to the Section 8343a lump-sum payment (Pet. 16-17). Petitioner relies on statements made by Representative Rostenkowski, Chairman of the House Ways and Means Committee, in response to questions raised by Representative Ford, Chairman of the House Post Office and Civil Service Committee, with regard to the tax treatment of certain types of distributions from the Fund. 132 Cong. Rec. 26,207-26,208 (1986). Representative Rostenkowski stated, among other things, that (*ibid.*):

> if an existing employee makes an election to be covered under the new Federal employee retirement system or under the integrated offset system and the employee receives a refund of excess contributions paid onto [*sic*] the old civil service retirement system, the refunded contributions are also treated as part of a separate contract and, therefore, are treated as a nontaxable return of employee contributions.

Petitioner admits that Representative Rostenkowski's "comments did not relate to the lump-sum credit [under 5 U.S.C. 8343a]" (Pet. 17 n.23). Such comments with respect to a refund of "excess" contributions to an "existing" employee who elects to be covered under FERS hardly show that Congress intended that the lump-sum payment an employee can elect to receive upon retirement are to be treated as part of a separate contract.

5. Petitioner correctly observes (Pet. 4) that the question of the proper income tax treatment of a lump-sum payment received under 5 U.S.C. 8343a affects many federal retirees who have received such payments.[7] The only courts that have considered the question (the courts below and the Tax Court in *Guilzon*) have held that the payments are taxable under Section 72(e) of the Internal Revenue Code. There is thus no conflict among the courts of appeals nor other reason warranting further review.

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[7] As noted at page 14-15, *supra*, Section 7001(a) of the Omnibus Budget Reconciliation Act of 1990 amended Section 8343a to suspend the alternative form of annuity election for employees retiring after November 30, 1990, and before October 1, 1995. Federal employees retiring during that period cannot elect to receive the lump-sum payment under Section 8343a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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